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## Competition Law in Edinburgh

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### Of competition, internet shopping and the single market...

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Internet shopping is now a fact of life for vast swathes of the EU population. From books to CDs to costlier and more sophisticated products, internet sales attracted 9.6% of all the retail spending in the UK only in the month of September, according to the British Office for National Statistics (see: <http://www.bbc.co.uk/news/business-15383602>). Ease of access and cheaper prices, as well as the ability to compare different goods and brands to find "better value for money" are among the key reasons for the popularity of online shopping.

Against this background, it is somehow surprising that some suppliers remain heavily poised against this means of distribution for their own goods. It could be argued that, as the Court recognised in its *Metro* judgment in 1977, price competition, despite being so important that it could not be eliminated, did not represent the only "effective" form of rivalry to which precedence must always be given. For this reason, the Court took the view that suppliers of "high quality and technically advanced products" could restrict the channels of distribution for these goods according to "quality based" criteria: in its opinion, the presence of "a variety of channels of distribution adapted to the peculiar characteristics of the various producers and to the requirements of the various categories of consumers" would be compatible with Article 101(1) so long as the retailers participating in them were selected according to objective criteria of a qualitative nature, linked to the nature of the goods, the level of training of the staff and the quality of the resellers' premises and applied in a non-discriminatory way. (case C-26/76, *Metro v Commission*, [1977] ECR 1875 para. 20).

In light of *Metro*, "selective distribution systems" were allowed in a number of industries, from hi-fi to "luxury goods", such as perfumes and high end make up (see e.g. *Cast T-19/92, Groupement d'Achat E. Leclerc v Commission*, [1996] ECR II-1851). However, could certain forms of distribution, such as internet sales, be excluded outright on account of the "sophisticated" nature of the goods concerned? It was this question that was put before the Court of Justice by the Court of Appeal of Paris in the *Pierre Fabre v Autorite' de la Concurrence* and others (case C-439/09, decision of 13 October 2011).

The Luxembourg judges were asked to consider whether clauses contained in a selective distribution system for high end cosmetics and de facto preventing internet sales were compatible with Article 101 on the ground that the products' characteristics justified "non-price" competition; it was argued before the domestic court that the nature of these products required the "physical presence" of a qualified pharmacist. However, already the referring judge had noted that this requirement de facto prevented internet sales and, consequently, had raised the question before the ECJ as to whether a de facto "blanket ban" on this type of selling practice was compatible with the EU competition rules.

Perhaps not surprisingly, the ECJ recalled that there may be "legitimate requirements" of products or services that may justify "alternative selling arrangements" resulting in the limitation of price competition, as had been the case in *Metro*. However, the Court made clear that any such limitation should be proportionate to the aim it sought to pursue. Although it was made clear that it would be up to the domestic court to assess whether the arrangement had de facto resulted in a "blanket ban" of specific forms of supply, it was held that neither the nature of the cosmetics-which were not akin to prescription medication for instance-nor their "prestigious image" justified a restriction of competition such as a ban on internet sales. The Court opined that this arrangement constituted an infringement of Article 101(1) by reason of its object: it emphasised that, unlike other "medical

products or devices" sold in pharmacies, the cosmetics did not require the physical presence of a qualified pharmacist. Consequently, an arrangement resulting in a total ban on sales via the web was not "objectively justified" and should therefore be caught by the Treaty competition rules. Importantly the Court equated the restraint to a restriction on "passive sales", which formed part of the "black listed" arrangements listed in the BER No 2790/99. It was held that since it affected the ability of end users to approach resellers based outside their area of residence/activity, the arrangement contravened the principle that, while resellers could be prevented from seeking out business from outside their "catchment", buyers should be left free to approach any retailer (even within a selective distribution system) within the common market.

Pierre Fabre is a very important decision, which draws on established legal principles and seeks to uphold the freedom of customers to choose the most convenient way of purchasing products and services as well as the freedom of retailers to choose the most appropriate way of marketing the products they stock and to trade within the widest possible geographic remit. Although its conclusions are not surprising, especially in light of the BER provisions, the Court of Justice sends a powerful message that any restriction on the mode of retail of products or services-even those products or services which would justify the establishment of selective distribution systems-which constitutes a restriction on the consumers' ability to "shop around" going beyond what is strictly necessary to take into account the "special nature" and features of these products will not be tolerated.

The preliminary ruling is surely to be welcome also from a commercial standpoint: given the weight of internet sales and the benefits that they can bring to consumer choice, especially for those purchasers who have no easy access to high street shops, Pierre Fabre represents a strong endorsement of this form of retail across the single market and a recognition of the importance of the freedom of trade and the ability to compete through not only pricing but also the use of innovative, consumer friendly retail techniques.

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